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COMMISSION ON HUMAN RIGHTS
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of Minorities
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Agenda item 10 (a)

THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

QUESTION OF HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Report of the Working Group on Detention

Chairman: Mr. Ribot Hatano

Rapporteur: Mr. Aidid Abdillahi Ilkahanaf

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Introduction

1. By resolution 7 (XXVII) of 20 August 1974, the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to review every year the situation concerning the rights of persons subjected to any form of detention or imprisonment. At its forty-third session, the Sub-Commission decided to continue the practice of establishing a sessional working group on detention. The existing regional groups within the Sub-Commission nominated the following experts as members of the Working Group, and they were duly appointed on 6 August 1991: Mr. Leandro Despouy (Latin America), Mr. Ribot Hatano (Asia), Mr. Aidid Abdillahi Ilkahanaf (Africa), Mr. William W. Treat (Western European and other States), and Mr. Danilo Türk (Eastern Europe).

2. The Working Group met on 12, 14 and 15 August 1991. The report of the Working Group was adopted unanimously at its 3rd meeting on 15 August 1991.

3. At the 1st meeting, the outgoing Chairman, Mr. Louis Joinet, proposed that in accordance with established practice the Working Group elect its outgoing Rapporteur as Chairman of its present session. The Working Group accordingly elected Mr. Ribot Hatano Chairman. On the proposal by Mr. William Treat, supported by Mr. Leandro Despouy, the Working Group elected Mr. Aidid Abdillahi Ilkahanaf Rapporteur.

4. At the same meeting, Mr. Jan Martenson, Under-Secretary-General for Human Rights, made a statement.

5. The following members of the Sub-Commission, who are not members of the Working Group, also took part in the discussions. Mr. Miguel Alfonso Martínez (2nd and 3rd meetings), Mrs. Mary Concepción Bautista (2nd and 3rd meetings), Mr. El Hadji Guissé (1st, 2nd and 3rd meetings), Mr. Louis Joinet (1st meeting), Mr. John Carey (alternate) (1st, 2nd and 3rd meetings), Mr. Cornelis Flinterman (alternate) (1st and 3rd meetings), and Mr. Juan Carlos Hitters (alternate) (2nd meeting).

6. The observer for the Government of Portugal also addressed the Group (2nd meeting).

7. Statements were made by representatives of the following non-governmental organizations in consultative status with the Economic and Social Council: Amnesty International (1st meeting), Defence for Children International Movement (2nd meeting), International Commission of Jurists (1st and 2nd meetings), International Federation of Human Rights (1st and 2nd meetings), and International Movement for Fraternal Union among Races and Peoples (1st and 3rd meetings).

8. The representative of the Centre for Social Development and Humanitarian Affairs, Mr. Kurt Neudek, also made statements (1st, 2nd and 3rd meetings).

9. Upon the request of the Rapporteur, a member of the secretariat made a statement at the 1st meeting concerning the practice of not mentioning specific countries in the synopsis of materials received from non-governmental organizations in consultative status with the Economic and Social Council.

10. The Working Group had before it the following documents submitted under item 10 of the Sub-Commission's agenda:

Report of the Secretary-General containing information received from Governments pursuant to Sub-Commission resolution 7 (XXVII) of 20 August 1974 (E/CN.4/Sub.2/1991/19 and Add.1);

Report of the Secretary-General containing information submitted by United Nations bodies, specialized agencies and intergovernmental organizations pursuant to Sub-Commission resolution 7 (XXVII) of 20 August 1974 (E/CN.4/Sub.2/1991/20);

Report of the Secretary-General on succinct information on developments in the human rights programme and on the activities within the United Nations programme on crime prevention and control as they relate to the question of human rights of persons subjected to any form of detention or imprisonment (E/CN.4/Sub.2/1991/22);

Consolidated list of the Secretary-General of provisions in the various United Nations standards relating to human rights in the administration of justice (E/CN.4/Sub.2/1991/26);

Note by the Secretary-General on the synopsis of material received from non-governmental organizations in consultative status with the Economic and Social Council (E/CN.4/Sub.2/1991/21);

Note by the Secretary-General on the question of human rights of persons subjected to any form of detention or imprisonment (E/CN.4/Sub.2/1991/25);

Report prepared by Mrs. Mary Concepción Bautista, Special Rapporteur, in accordance with resolution 1990/21 of the Sub-Commission on the application of international standards concerning the human rights of detained juveniles (E/CN.4/Sub.2/1991/24);

Fourth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37 (E/CN.4/Sub.2/1991/28);

Second report prepared by Mr. Stanislav Chernichenko and Mr. William Treat in accordance with resolution 1990/18 of the Sub-Commission and resolution 1991/43 of the Commission on Human Rights (E/CN.4/Sub.2/1991/29);

Working paper submitted by Mr. Miguel Alfonso Martínez on the privatization of prisons (E/CN.4/Sub.2/1991/56).

11. The Working Group had before it the following documents submitted under item 11 of the Sub-Commission's agenda:

Report prepared by Mr. Louis Joinet, Special Rapporteur, in accordance with resolution 1990/23 of the Sub-Commission, on the independence of the judiciary and the protection of practising lawyers (E/CN.4/Sub.2/1991/30 and Add.1-4).

12. The Working Group also had before it the following documents:

Provisional agenda (E/CN.4/Sub.2/1991/WG.1/L.1);

General Assembly resolution 45/166, entitled "Human rights in the administration of justice";

Commission on Human Rights resolution 1991/34, entitled "Human rights in the administration of justice";

Report of the Working Group on Detention on its 1990 session (E/CN.4/Sub.2/1990/32);

Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba, 27 August-7 September 1990 (A/CONF.144/28);

Note prepared by the Secretariat on the existing international norms and their application concerning the death penalty (E/CN.4/Sub.2/1991/WG.1/CRP.1);

Working paper presented by Mr. John Carey (E/CN.4/Sub.2/1991/WG.1/WP.1).

Adoption of the agenda

13. At its first meeting, the Working Group considered the provisional agenda contained in document E/CN.4/Sub.2/1991/WG.1/L.1. Following the suggestions of the Chairman, which were based on informal consultations with other members of the Working Group, the Working Group decided to adopt the following agenda:

1. Annual review of developments concerning the human rights of persons subjected to any form of detention or imprisonment.

2. Habeas corpus as a non-derogable right.

3. The death penalty, with special reference to its imposition on persons less than 18 years of age.

4. Juvenile justice.

5. Privatization of prisons.

6. Model legislation on detention and other subsidiary items.

I. ANNUAL REVIEW OF DEVELOPMENTS CONCERNING THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

A. Evaluation of 1991 synopsis of material received from non-governmental organizations in consultative status with the Economic and Social Council

14. At its 1st meeting, the Working Group started consideration of agenda item 1. At the invitation of the Chairman, Mr. El Hadji Guissé presented his views on recent trends and situations identified in the synopsis prepared by the secretariat based on information received from non-governmental organizations in consultative status with the Economic and Social Council (E/CN.4/Sub.2/1991/21).

15. Mr. El Hadji Guissé said that, given the limited information that had been received from non-governmental organizations, as reflected in the synopsis, he would present general ideas on different forms of detention. There were two main forms of detention: administrative detention and criminal detention. Administrative detention was a deprivation of liberty unconnected with the commission of an offence under criminal law and linked to the protection of public order - an ill-regulated concept constituting a major source of human rights violations. Administrative detention could also be based on health grounds, especially the protection of incapable adults; some of its applications had entailed serious human rights violations. Criminal detention resulted from an offence under criminal law: it could take the form of police custody, which represented a grave threat for individual freedoms, or pre-trial judicial detention; on the latter point, Mr. Guissé raised the issue of redress for injury caused by misconceived detention, illustrating his remarks by mentioning the example of Senegalese law. Referring to the need to revise the synopsis, he suggested that it should be based on the topics chosen by the Working Group as its agenda for 1992.

16. Mr. Flinterman voiced concern at the small amount of information submitted in the current year by non-governmental organizations to be taken into account in the synopsis, and expressed consternation over Amnesty International's decision not to continue to submit information since specific countries were not identified. Furthermore, while noting the valuable information contained in the report, he supported the proposal to mention in the synopsis the States where such situations manifested themselves.

17. Mr. Joinet emphasized that, in the absence of information, the synopsis was useless. However, he proposed two possible solutions: either stopping the issuing of the report or mentioning the names of countries concerned in order to restore the usefulness of the document. He raised the question of whether, if the latter solution was adopted, it would be possible to use a similar approach to that used for his report on the independence of the judiciary. In that connection, information contained in the synopsis would be sent to the Governments concerned for their comments on the content and accuracy of the information provided. It would be assumed if no comments were received that the information contained in the synopsis was acceptable and would be reflected in the report. Such a development would constitute a first step in the direction of creating an annual report, a possibility

which had been discussed in the Working Group on Method of Work of the Sub-Commission. In addition, he stated that the synopsis should also be revised to include the positive and negative developments within specific countries and areas.

18. Mr. Ilkahanaf pointed out that the usefulness of the synopsis would be increased if the names of the countries concerned were mentioned. He questioned the secretariat as to the reason for not mentioning them and then asked Amnesty International to explain its position as referred to in paragraph 4 of the synopsis (E/CN.4/Sub.2/1991/21).

19. The representative of the secretariat, responding to Mr. Ilkahanaf's query, stated that the practice since 1974 was only to identify worldwide trends and developments rather than specific cases, since other United Nations mechanisms existed to deal with them. However, should the Working Group decide otherwise the secretariat would comply with its wishes.

20. The representative of Amnesty International explained the position of her organization concerning the synopsis and specified that that was without prejudice to the collaboration of Amnesty with the Sub-Commission. As to the usefulness of the annual report, she emphasized that in its present form the report was useless because the names of countries were not mentioned.

21. The representative of the International Commission of Jurists supported the idea of mentioning the States concerned and said that Mr. Joinet's report on the independence of the judiciary represented a useful model.

B. Information on a new United Nations crime prevention and criminal justice programme, the Eighth Congress on Prevention of Crime and the Treatment of Offenders and international cooperation

22. The representative of the Centre for Social Development and Humanitarian Affairs outlined the new programme of the United Nations on crime prevention and criminal justice which was currently being established. It had been considered at the recent meeting of the Intergovernmental Working Group in Vienna from 5 to 9 August 1991. The Working Group proposed, in particular, to establish the Commission on Crime Prevention and Criminal Justice, to retain the United Nations congresses on a quinquennial basis and to dissolve the Committee on Crime Prevention and Control upon the establishment of the Commission.

23. He emphasized the importance of the collaboration between the two bodies in the implementation of relevant aspects of the human rights programme and the crime prevention and criminal justice programme. In particular, that should be done in the light of the follow-up to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, 1990). The decisions and instruments adopted by the Congress were widely commented on. The need for cooperation in the field of advisory services and technical assistance was also underlined. Some members of the Group and representatives of non-governmental organizations shared and supported his ideas concerning the further development of collaboration and cooperation.

II. HABEAS CORPUS AS A NON-DEROGABLE RIGHT

24. At the 1st meeting of the Working Group, Mr. John Carey presented his working paper entitled "Habeas Corpus as a non-derogable right" (E/CN.4/Sub.2/1991/WG.1/WP.1). He stated that he had analysed both the national and international standards of habeas corpus. In so doing, he had observed that there were not only differing domestic standards concerning the non-derogability of habeas corpus but that little international consensus existed either. While the Inter-American Court of Human Rights acknowledged that habeas corpus and amparo were non-derogable rights, neither the European Convention on Human Rights nor the International Covenant on Civil and Political Rights recognized their non-derogability. He also observed that certain countries, while not directly permitting derogation of habeas corpus, indirectly allowed derogation under specific constitutional provisions. Given the importance of that issue, further work on the topic would be very useful and the Working Group should consider transmitting such a recommendation to the Sub-Commission.

25. The members of the Working Group expressed appreciation to Mr. Carey for his elucidative working paper and noted its significant contribution to the discussion. Several members of the Working Group, in stressing the importance of habeas corpus in protecting human rights, observed that the most serious violations of the human rights of detainees occur during states of emergency when certain legal remedies were not upheld. Thus, it was observed by participants, habeas corpus gained greater significance during states of emergency and they reiterated the view on habeas corpus of the Working Group on Enforced or Involuntary Disappearance, that it represented a potentially powerful legal tool for protecting against disappearances, torture and other human rights violations.

26. Mr. El Hadji Guissé observed that habeas corpus provided an effective remedy to detainees to get out of detention legally and that it provided greater legal possibilities to individuals when institutions were suspended. In addition, he pointed out that it provided guarantees against torture, mistreatment of detainees and prisoners, and addressed other problems relating to penal conditions.

27. Mr. Leandro Despouy stressed that habeas corpus provided a simple and effective remedy before courts for protecting persons against arbitrary detention. Noting that in Latin America the human rights situation during states of emergency was of particular concern, he observed that the status of habeas corpus was unclear in certain Latin American situations where constitutions were suspended but the legal remedy of amparo was not automatically suspended. He also stated that Argentinian law protected the physical and mental integrity of detained and imprisoned persons. Considering that habeas corpus should be included among the non-derogable judicial guarantees, he proposed the following: all countries should provide for habeas corpus guarantees, which should not be derogated even in states of emergency. Mr. Treat and Mr. Chernichenko should continue to examine the issues of habeas corpus as a non-derogable right in their study and Mr. Carey elaborate his research on that topic.

28. Emphasizing the importance of the safeguard provided by habeas corpus, Mr. Ilkahanaf stated that its wide recognition and application should be encouraged and promoted. He then emphasized the importance of bringing detainees before the court as a protective measure to ensure against them "disappearing". He further noted that it also represented a certain legal means for the prevention of torture and arbitrary detention.

29. Mr. Joinet stated that the lack of international consensus on the status of habeas corpus might be due to a lack of information rather than weak political will. He went on to observe that certain countries did not have such a legal remedy in their domestic system of law. He further noted that such a set of rules constituting guarantees and safeguards must be seen as non-derogable even during states of emergency.

30. Mr. Alfonso Martínez analysed the legal aspects of Mr. Carey's working paper, especially issues relating to the detention and suspension of rights during states of emergency. He was of the opinion that guarantees provided by habeas corpus should be incorporated into every country's national legislation as a non-derogable right.

31. Ms. Bautista supported the views of the other participants that habeas corpus should not be derogated during states of emergency. She also stated that habeas corpus should be an available remedy for lower as well as higher courts. She considered it important, if a detainee was unable, owing to his or her conditions of imprisonment, to submit a petition, that any other person should have the right to do it on his or her behalf.

32. Mr. Treat informed the Working Group that Mr. Chernichenko's and his second report on the right to a fair trial contained some material and references to habeas corpus. In that connection, Mr. Treat noted that the continuing research for their report might raise concern over possible duplication, and he felt that considerable overlap would occur. However, he suggested that the Working Group invite Mr. Hitters and Mr. Carey to assist the Rapporteurs on the right to a fair trial by undertaking in-depth research on the subject of habeas corpus that the Rapporteurs might wish to incorporate in their study.

33. On that question, Mr. Ilkahanaf expressed the view that should the study of Mr. Treat and Mr. Chernichenko on the right to a fair trial contain enough elements on habeas corpus as a non-derogable right, there might be no need to assign another expert. If this were not the case, then the Working Group could request Mr. Carey and Mr. Despouy to submit an elaborated working paper on the question of habeas corpus and amparo as non-derogable rights.

34. Mr. Hitters joined the consensus that habeas corpus should be a non-derogable right. In providing the historical background to support that view, he analysed the European and the inter-American systems for the protection of human rights. In his opinion, the purpose of habeas corpus was to protect the personal freedom of a detainee and enable him or her to be brought before a court to ensure that his or her physical and moral integrity were respected.

35. The representative of Portugal joined previous speakers in acknowledging the importance of the study of the question of habeas corpus. She stressed that she would welcome recognition of the importance of the existence of a procedural guarantee such as habeas corpus and also its recognition as a non-derogable right at both the international and national levels. In that connection, she referred to her country's legal system, which guranteed the non-derogability of the remedy of habeas corpus.

36. Mr. Neudek informed the Working Group that issues relating to habeas corpus were also under consideration by the Committee on Crime Prevention and Control, which had received a mandate from the Eighth Congress to deal with the matter. The Committee expected to submit its preliminary findings to the Ninth Congress.

37. The representative of Amnesty International noted that the widespread use of administrative detention and holding detainees incommunicado facilitated the occurrence of other human rights violation such as summary or arbitrary execution, torture or enforced "disappearances". She also expressed the view that habeas corpus should be considered as a non-derogable right, basing that view, inter alia, on an advisory opinion of the Inter-American Court of Human Rights. That view was supported by most of the members of the Working Group.

38. The representative of the International Movement for Fraternal Union among Races and Peoples drew the attention of the Working Group to situations in Africa, in particular to the other legal remedies derived from Western standards and tribal systems. Further, he stressed that international instruments must have universal scope and to achieve this measures should be introduced to eradicate inequalities in different legal systems.

39. The representative of the International Commission of Jurists, speaking also on behalf of the International Federation of Human Rights and Defence for Children International Movement, reiterated the common view that habeas corpus was of great importance to those deprived of their liberty since it protected the personal freedom of a detainee and ensured that his or her life and physical integrity was respected. In analysing the application of habeas corpus in a variety of situations, he expressed his conviction that the civilian judiciary should retain jurisdiction during a state of emergency to review individual cases of detention, at least to ensure that the stated grounds for detention were valid and sufficient and that proper procedures had been complied with and were lawful.

40. Mr. Carey noted in particular that the United States Congress had passed legislation which limited certain writs of habeas corpus. He also expressed the opinion that members and other participants had contributed to his understanding of the application of habeas corpus in different legal systems.

41. There was general agreement among the members to retain the item on the agenda of the Working Group's next session. They also decided to invite Mr. Carey and Mr. Hitters to prepare an in-depth working paper on habeas corpus and amparo as non-derogable rights, with a view to assisting the Special Rapporteurs of the Sub-Commission, Mr. Chernichenko and Mr. Treat, in the preparation of their report on the right to a fair trial, so that the Sub-Commission would be in a position to examine all aspects of the issue.

III. THE DEATH PENALTY, WITH SPECIAL REFERENCE TO ITS IMPOSITION ON PERSONS OF LESS THAN 18 YEARS OF AGE

42. At its 2nd meeting, the Working Group took up the question of the imposition of the death penalty, particularly on persons of less than 18 years of age.

43. Mr. Guissé recalled the mandate conferred on him by the Working Group at its previous session (see E/CN.4/Sub.2/1990/32, paras.39-40). Reviewing worldwide trends in relation to the death penalty, he noted the tendency towards a clearer perception of the need to abolish capital punishment and the reasons adduced by certain States to justify its maintenance. He expressed particular concern over the application of the death penalty to political offences and offences committed by minors. He also stressed the need for crime prevention as a way of avoiding recourse to the death penality and emphasized the importance of substitute penalties, whether legal or jurisprudential, for instance mitigating circumstances and use of the right to pardon. Lastly, he summarized the current situation regarding the death penalty under international law.

44. It was agreed that the question of the imposition of the death penalty should be included in the Working Group's 1991 provisional agenda as a separate item. The Working Group also decided to entrust Mr. Guissé with the preparation of a working paper on the death penalty, so that the Working Group would be able to discuss and examine various aspects of the issue in depth at the next session.

IV. JUVENILE JUSTICE

45. Ms. Bautista presented her report on the application of international standards concerning the human rights of detained juveniles (E/CN.4/Sub.2/1991/24).

V. PRIVATIZATION OF PRISONS

46. Mr. Alfonso Martínez presented his working paper on the privatization of prisons. In doing so, he submitted the following proposals:

(a) That the Sub-Commission consider the question of privatization of prisons at its forty-fourth session, in 1992, under item 10 (a) of its provisional agenda;

(b) That Governments, intergovernmental and non-governmental organizations be requested to submit their views on the matter to the Secretary-General, if possible not later than 15 April 1992; and

(c) That the Secretary-General be requested to submit to the Sub-Commission at its forty-fourth session a document containing the said responses compiled and presented systematically, with analytical comments.

VI. MODEL LEGISLATION ON DETENTION AND OTHER SUBSIDIARY ITEMS

47. Mr. Hatano, the Chairman, drew the attention of the members of the Working Group to General Assembly resolution 45/166 and Commission on Human Rights resolution 1991/34, both entitled "Human rights in the administration of justice". In response to the request contained in those resolutions, the Secretary-General prepared a consolidated list of provisions in the various United Nations standards relating to human rights in the administration of justice (E/CN.4/Sub.2/1991/26). It was suggested to continue the consideration of this issue at the next session of the Working Group in order to address the issues put forth by the General Assembly and the Commission.

VII. PROVISIONAL AGENDA FOR THE NEXT SESSION

48. At its 3rd meeting, the Working Group adopted the following provisional agenda for the next session:

1. Election of a chairman and a rapporteur.

2. Adoption of the agenda.

3. Annual review of developments concerning the human rights of persons subjected to any form of detention or imprisonment.

4. Habeas corpus as a non-derogable right and as one of the requirements for the right to a fair trial.

5. The death penalty, with special reference to its imposition on persons less than 18 years of age.

6. Juvenile justice.

7. Privatization of prisons.

8. Model legislation on detention and other subsidiary items.

9. Provisional agenda for the next session.

10. Adoption of the report of the Working Group to the Sub-Commission.